FILE COPY

NOV 28
CHARLES E.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 98

ARIZONA GROCERY COMPANY, *Petitioner*
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., *Respondents*

ARIZONA GROCERY COMPANY, *Petitioner*
vs.
SOUTHERN PACIFIC COMPANY ET AL., *Respondents.*

APPLICATION BY THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND ACCOMPANYING BRIEF IN SUPPORT OF THE PETITION.

JOHN E. BENTON,
CLYDE S. BAILEY,
603-606 Otis Building,
Washington, D. C.

THE J. W. STOWELL PRINTING COMPANY, FREDERICKSBURG, MD.

INDEX.

Page

APPLICATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE 1

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI 2

Statement of the Interest of the National Association of Railroad and Utilities Commissioners 2
Opinion Below 3
Statement of the Case 3

Statement and Argument of Arizona Corporation Commission Brief Adopted 3

Summary of Additional Argument 5

The Interstate Commerce Act Lays Upon Carriers the Duty to Keep Their Rates at all Times Just and Reasonable, and Failure to Perform this Duty Constitutes a Violation of the Act, the Resulting Damages from which may be Recovered in Reparation Proceedings 5

The Interstate Commerce Commission, When Acting Upon Reparation Claims, Exercises a Power Distinct from its Rate Making Power, and Directed to a Distinctly Different Purpose 9

The Decisions of State Courts Dealing with State Statutes Are Not Applicable 10

The Rates Involved Were Not Commission-Made 10

TABLE OF CASES CITED.

Baer Bros. Mercantile Co. v. D. & R. G. R. Co., 233 U. S. 479 9
Brimstone R. R. Co. v. United States, 276 U. S. 104 7
Eagle Cotton Oil Co. v. Southern Railway, 51 F.(2d) 443 10
Ex Parte 74, 58 I. C. C. 220 7
I. C. C. v. Baltimore R. Co., 145 U. S. 265 6
News Syndicate Co. v. New York Central R. R., 275 U. S. 179 9
Reduced Rates, 1922, 68 I. C. C. 676 4
Steel & Tube Co. v. Director General, 61 I. C. C. 526 7
Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 . . . 7
Texas and Pacific Railway v. Gulf, Colorado & Santa Fe Railway, 270 U. S. 266 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 98

ARIZONA GROCERY COMPANY, *Petitioner*
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., *Respondents*

ARIZONA GROCERY COMPANY, *Petitioner*
vs.
SOUTHERN PACIFIC COMPANY ET AL., *Respondents.*

APPLICATION BY THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN THE ABOVE ENTITLED PROCEEDING IN SUPPORT OF THE PETITION THEREIN.

The National Association of Railroad and Utilities Commissioners asks leave of the Court to file a brief amicus curiae in support of the petition in the above entitled proceeding. The interest of said Association in said proceeding is set forth in the brief which it asks leave to file, which brief is hereto attached.

NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

By JOHN E. BENTON
CLYDE S. BAILEY
603-606 Otis Building,
Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 98

ARIZONA GROCERY COMPANY, *Petitioner*
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., *Respondents*

ARIZONA GROCERY COMPANY, *Petitioner*
vs.
SOUTHERN PACIFIC COMPANY ET AL., *Respondents.*

BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS IN THE ABOVE ENTITLED PROCEEDING IN SUPPORT OF THE PETITION THEREIN.

Statement of the Interest of the National Association of Railroad and Utilities Commissioners.

This brief is filed on behalf of the National Association of Railroad and Utilities Commissioners at the direction of that Association contained in a resolution adopted at its 1931 annual convention, held in Richmond, Virginia, October 20-23, 1931. Said Association is a voluntary Association embracing within its membership the members of the commissions and boards of the several states of the United States exercising regulatory jurisdiction over the intrastate rates and services of common carriers by railroad. Under the laws of many of said states it is the duty of the

respective commissions, in the exercise of discretion, to represent the interests of the public in their respective states in any proceeding pending before the Interstate Commerce Commission or in the federal courts in which interstate rates may be involved.

Section 16(1) of the Interstate Commerce Act confers jurisdiction upon the Interstate Commerce Commission to make awards of reparation to shippers in cases wherein, after hearing, the Commission finds that unjust and unreasonable rates have been exacted. The decision rendered in this case by the Court of Appeals, if the same shall be sustained and hereafter followed as establishing a rule of general application, will operate in substantial effect to destroy the power to award reparation granted to said Interstate Commerce Commission, as aforesaid. Because this power is a valuable safeguard against the imposition of unreasonable rates, the destruction of which would be a great injury to the public generally, said Association, on behalf of the state commission, files this brief.

OPINION BELOW.

The opinion of the Court of Appeals is reported 49 F.(2d) 563. The opinion of the District Court is not reported.

STATEMENT OF THE CASE.

Statement and Argument of Arizona Brief Adopted.

The statement of the case contained in the brief heretofore filed in this proceeding by Arizona Corporation Commission is adopted for this brief. We likewise adopt the argument contained in that brief.

The question presented is whether the Interstate Commerce Commission has jurisdiction to award reparation for damages caused by the exaction of unreasonable rates when the rates complained of fall within the limits of a maximum rate order made by the Interstate Commerce Commission and continuing in effect at the time of the exaction of the rates.

The contention of the carriers, adopted as the basis of the judgment below, is that inasmuch as the rates involved in this proceeding conformed to the Commission's maximum rate order of June 22, 1921, and to the Commission's decision made May 16, 1922, in *Reduced Rates, 1922*, 68 I. C. C. 676, the Commission lacks jurisdiction to find such rates unjust and unreasonable, and to award reparation for their exaction.

The appellant, on the other hand, contends that the prescribing of a maximum rate level by the Commission does not establish that all rates not exceeding that level are just and reasonable so long as the order continues in effect; that the Interstate Commerce Act imposes a continuing duty upon all carriers subject to the Act to keep their rates at all times just and reasonable; that the carriers are not relieved from this duty by the making of a maximum rate order by the Commission; and that notwithstanding such an order, if a carrier exacts a rate which is in fact unjust and unreasonable, such exaction constitutes a violation of the Interstate Commerce Act, and renders the carrier liable for the damages resulting to shippers therefrom.

In the Arizona brief it was pointed out that the Interstate Commerce Commission often deals with rates in the mass, by maximum rate orders. It was, for example, pointed out that in the *Rate Structure Investigation*, No. 17,000, the Commission is engaged in an investigation of all rates and charges of the rail carriers, and is proceeding, from time to time, to deal with such rates by the making of maximum rate orders effective over vast areas, and that when the *Rate Structure Investigation* shall have been completed it is to be expected that maximum rate level orders will have been issued covering all of the freight transportation of the United States. It accordingly is obvious that if the ruling made below in this case shall be sustained, and established, the result will be that the Interstate Commerce Commission will presently be unable to exercise the power to grant reparation as to any freight rates, because all such rates will be within the limits of general maximum rate orders issued by the Commission. The result which would follow from the construction given to the Act in the Court

of Appeals is thus adverted to because it is believed that a construction which produces such a result can not be in accord with the intent of Congress.

SUMMARY OF ADDITIONAL ARGUMENT.

1. The Interstate Commerce Act lays upon carriers the duty to keep their rates at all times just and reasonable, and failure to perform this duty constitutes a violation of the Act, the resulting damages from which may be recovered in reparation proceedings.

2. The Interstate Commerce Commission, when acting upon reparation claims, exercises a power distinct from its rate making power, and directed to a distinctly different purpose.

3. The decisions of state courts dealing with state statutes are not applicable.

4. The rates involved were not Commission-made.

1. The Interstate Commerce Act Lays Upon Carriers the Duty to Keep Their Rates At All Times Just and Reasonable, and Failure to Perform This Duty Constitutes a Violation of the Act, the Resulting Damages From Which May be Recovered in Reparation Proceedings.

Section 1(4) provides: "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish *** just and reasonable fares, rates and charges applicable thereto ***."

Section 1(5) provides: "All charges made for any service rendered or to be rendered in the transportation of passengers or property *** shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. ***."

These two paragraphs are to be read together. The imposition of an unreasonable rate at any time is made unlawful. It is the duty of the carrier to establish rates which

are reasonable, and to keep the same reasonable by such changes from time to time as are requisite to that end.

This duty to make and keep rates reasonable was the common law duty of the carriers before the Act to Regulate Commerce was passed. It was not changed by that Act. Instead of following the Texas Act, and various other state acts, which provided that the respective state commissions should make the rates to be received by carriers, the Act to Regulate Commerce was directed towards compelling performance of this common law duty. That duty was expressed in the statute; the Commission was given jurisdiction to direct carriers to desist for the future from exacting rates found by the Commission to be unreasonable, and the Commission was furthermore given power to make awards of reparation to cover damages caused by past unreasonable exactions. The plan of the Act was to give emphasis to the common law duty by stating it in the statute, and to compel observance of it.

While the Commission's power to condemn rates as unreasonable, and to require the carrier to desist from further exaction thereof, has, by successive amendments, been enlarged until now the Commission can exercise rate-making power, the duty of the carriers to establish and maintain just and reasonable rates remains today exactly what it was when the Act to Regulate Commerce was originally enacted. This duty of the carrier extends to all its rates, however the same may have come originally into effect, i.e., whether originally made by the carrier at its own motion, or in conformity with some order of the Interstate Commerce Commission.

"The whole purpose of the Act (to Regulate Commerce) was to create and compel the enforcement, without discrimination, of rates which were just and reasonable", as was stated by the Court of Appeals in its opinion in the instant case. (Rec. 448).

This Court has said: "The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation;—and to prohibit unjust discrimination." *I. C. C.* v. *Baltimore R. Co.*, 145 U. S. 265.

It is an elementary rule that a statute will be construed

to effectuate the purpose for which it was enacted: *Texas and Pacific Railway* v. *Gulf, Colorado & Santa Fe Railway*, 270 U. S. 266, 277.

To effectuate the purpose of the Act to secure just and reasonable rates Section 1 must be construed as obligating the carriers with respect to rates fixed in conformance with orders of the Interstate Commerce Commission, as well as rates made by the carriers on their own motion. Any other construction would make the Act defeat the purpose for which it was enacted, since by the Act the common law right of the shipper to seek reparation in the courts was abrogated. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Unless the Commission's power to award reparation extends to rates established under orders of the Commission the Act will be a shield of defense to the carriers in the perpetration of wrongs.

It is unavoidable that unjust rates will often be exacted. This is true because it is manifestly impossible that the Commission can keep itself informed as to the constantly changing conditions which affect the reasonableness of the countless rates which have come into effect under orders made by the Commission. It is especially true as to rates which have been established under maximum rate orders, for the reason that the Commission does not undertake in general rate cases to give consideration to particular rates.

When the rates here involved were advanced 25 percent under the authority of the Commission's decision in *Ex Parte 74*, 58 I. C. C. 220, the Commission authorized advances "without prejudice to any subsequent finding in individual situations", and expressly stated that the new rates "must necessarily be subject to such readjustments as the facts may warrant", and carriers were notified that they should deal with claims for readjustment "promptly and effectively."

The Commission expressly stated in its report in *Steel & Tube Co.* v. *Director General*, 61 I. C. C. 526, that "sanction of a general adjustment does not carry with it the approval of any particular rate."

This decision of the Commission was cited by this Court with approval in *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, where the Court said:

"The general findings and permission of Ex Parte 74 and Matter of Reduced Rates did not approve or fix any particular rate. *** In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration."

As has been before pointed out, the Interstate Commerce Commission in late years has developed the practice of dealing with rates in the mass, by the promulgation of maximum rate orders covering classes of rates and effective over vast areas. It now has in progress a single proceeding,—*Rate Structure Investigation*, No. 17,000,—upon completion of which all rates, or substantially all rates, throughout the United States will be covered by such orders, issued in that proceeding.

If shippers who may be subjected to unreasonable rates as an incident to these wholesale readjustments, or as an incident to changed conditions, may not apply to the Commission in reparation proceedings to recover damages to which they are subjected, they will be left without any remedy whatever, since, as we have seen, their common law right to apply to the courts for redress has been abrogated by the provisions of the Interstate Commerce Act.

If, therefore, the construction which was placed upon the Interstate Commerce Act by the Court of Appeals in the instant case shall be sustained, the purpose of the Act will be not promoted but defeated, and the carriers will be enabled to make unjust exactions with impunity, so long as they keep within the limits of some general rate order once issued by the Commission. Under such construction it would become in the interest of carriers to keep their rates, irrespective of their reasonableness, at the highest possible level, and, indeed, a premium would be placed upon failure to take note of changed conditions which might operate to make particular rates repugnant to the statute.

The Act, however, is explicit in its outlawry of all unreasonable rates, and in its imposition upon the carriers of the

duty to establish rates which are reasonable. A failure to perform this duty is made an actionable tort, for which any shipper injured thereby may recover damages by reparation proceedings. *News Syndicate Co.* v. *New York Central Railroad*, 275 U. S. 179.

2. The Interstate Commerce Commission, When Acting Upon Reparation Claims, Exercises a Power Distinct From Its Rate Making Power, and Directed to a Distinctly Different Purpose.

The Interstate Commerce Commission with respect to rates exercises a double function, one legislative in its nature and the other judicial. Acting legislatively it controls rates to be exacted in the future. Acting judicially it passes upon claims for injuries alleged to have been caused by past illegal exactions. The distinction between these two functions has been declared with great clearness by this court in *Baer Bros. Mercantile Co.* v. *D. & R. G. R. Co.*, 233 U. S. 479, as follows:

> "But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi legislative capacity, to prevent future injury to the public."

There is, accordingly, no anomaly in an exercise by the Commission of jurisdiction to declare unreasonable and tortious a rate which exists under a maximum rate order previously made by it, for the reason that the Commission in the exercise of its rate-making function may have made the order without any consideration whatever of the particular rate involved in the reparation proceeding, or the conditions affecting the transportation, and the reasonableness of the rate complained of, may have become altogether different when the rate was exacted from what they were when the Commission's order was made.

3. The Decisions of State Courts Dealing With State Statutes Are Not Applicable.

The Court of Appeals cited in support of its decision in the instant case various state court opinions dealing with state acts. We do not analyze the cases thus cited, but content ourselves with saying that we are confident this court will find that they are not applicable. The reasons for this have been most lucidly pointed out by Judge Hutcheson in *Eagle Cotton Oil Co. v. Southern Railway,* 51 F. (2d) 443. Summarily stated, they are not applicable because the federal act providing for regulation of carriers has continued upon the carriers their common law duty to keep rates reasonable; and as one method of enforcing that duty has given to the Interstate Commerce Commission jurisdiction to make awards of damages caused by breaches of it, whereas the states from which the state court opinions are cited have imposed upon their respective commissions the duty of promulgating rates which when so promulgated by law became obligatory upon the carriers.

4. The Rates Involved Were Not Commission-Made.

The making of a maximum rate order by the Interstate Commerce Commission leaves carriers complete freedom of action in framing their tariffs, except only that they may not exceed the maximum limit prescribed by the Commission's order.

In this case the maximum rate order of June 22, 1921 prescribed a maximum rate level of 96½ cents. The rate put into effect by the carriers was 96 cents. Thereafter, on July 1, 1922, following the Commission's decision in *Reduced Rates, 1922,* without order the carriers reduced this rate to 86½ cents, and finally, on January 10, 1924, they voluntarily reduced it to 84 cents (Rec. 252-258).

In *Eagle Cotton Oil Co.* v. *Southern Railway,* 51 F. (2d) 443, rates so made were held not to be Commission-made rates. We cite this case, but we contend, as argued by Judge Hutcheson in his concurring opinion in that case, that the Interstate Commerce Commission has jurisdiction

to award reparation for damages caused by the exaction of any unreasonable rate, even though the same may have been specifically prescribed by the Commission itself.

Respectfully submitted on behalf of said

NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS,

JOHN E. BENTON,
General Solicitor,

CLYDE S. BAILEY,
Assistant General Solicitor.